

## PART 1120—PUBLIC AVAILABILITY OF INFORMATION

### Subpart A—General

Sec.

- 1120.1 Purpose and scope of this part.
- 1120.2 Definitions.
- 1120.3 Existing records.

### Subpart B—Published Information

- 1120.5 Information published in the FEDERAL REGISTER.
- 1120.6 Information in A&TBCB publications.

### Subpart C—Records Available for Public Inspection and Copying, Documents Published and Indexed

- 1120.11 Records available for inspection.
- 1120.12 Indexes to certain records.
- 1120.13 Effect of nonavailability.

### Subpart D—Information Available Upon Request

- 1120.21 Policy on disclosure of records.
- 1120.22 Requests to which this subpart applies.
- 1120.23 Where requests for agency records must be filed.
- 1120.24 Misdirected written requests; oral requests.
- 1120.25 Form of requests.
- 1120.26 Deficient descriptions.
- 1120.31 A&TBCB receipt of requests; responsibilities of Freedom of Information Officer.
- 1120.32 A&TBCB action on requests.
- 1120.33 Time allowed for initial action on requests.
- 1120.34 Initial denials of requests.
- 1120.36 Appeals from initial denials.
- 1120.37 A&TBCB action on appeals.
- 1120.38 Time allowed for action on appeals.
- 1120.41 Exempt documents.
- 1120.42 Release of exempt documents.

### Subpart E—Copies of Records and Fees for Services

- 1120.51 Charges for services, generally.
- 1120.52 Computerized records.
- 1120.53 Payment of fees.

AUTHORITY: 5 U.S.C. 552, the Freedom of Information Act, as amended.

SOURCE: 45 FR 80976, Dec. 8, 1980, unless otherwise noted.

### Subpart A—General

#### § 1120.1 Purpose and scope of this part.

This part contains the general rules of the Architectural and Transportation Barriers Compliance Board for public access to Board records. These regulations implement 5 U.S.C. 552, the Freedom of Information Act, as amended, and the policy of the Board. It is the Board's policy to disseminate information on matters of interest to the public and to disclose on request all information contained in records in its custody insofar as is compatible with the discharge of its responsibilities and consistent with the law. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places and procedures to obtain information from records in the custody of the A&TBCB.

#### § 1120.2 Definitions.

For the purposes of this part:

(a) *A&TBCB* or *Board* means the Architectural and Transportation Barriers Compliance Board.

(b) *A&TBCB record* or *record* means any document, writing, photograph, sound or magnetic recording, drawing or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and which is, was, or is alleged to be under the control of the A&TBCB.

(1) The term includes—

(i) Informal writings such as handwritten notes and drafts;

(ii) Information preserved in a form which must be translated or deciphered by machine in order to be intelligible to humans;

(iii) Records which were created or acquired by the A&TBCB, its members, its employees, its members' employees, or persons acting on behalf of its members, by use of A&TBCB funds or in the course of transacting official business for the A&TBCB.

(2) The term does not include—

(i) Materials which are legally owned by an A&TBCB member, employee, or member's employee or representative

in his or her purely personal capacity; and

(ii) Materials published by non-Federal organizations which are readily available to the public, such as books, journals, standards, and periodicals available through reference libraries, even if such materials are in the A&TBCB's possession.

(c) The terms *agency*, *person*, *party*, *rule*, *rulemaking*, *order*, and *adjudication* have the meanings given in 5 U.S.C. 551, except where the context demonstrates that a different meaning is intended, and except that for purposes of the Freedom of Information Act the term *agency* as defined in 5 U.S.C. 551 includes any executive department, military department, Government corporation, Government controlled corporation, the United States Postal Service, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency.

(d) A government record *under the control of the A&TBCB* means that the record is subject to the free disposition of the A&TBCB. This includes keeping the record available for governmental use as required and protecting, preserving, and exercising such control over it as may be necessary for that purpose. Control of a record is not synonymous with, and does not require, actual physical possession of the record.

(e) *Request* means a request to inspect or obtain a copy of one or more records.

(f) *Requestor* means any person who submits a request to the A&TBCB.

(g) *Public member* means a member appointed by the President from among members of the general public.

(h) *Direct Costs* means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and

heating or lighting the facility in which the records are stored.

(i) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Agencies should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, agencies should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. *Search* should be distinguished, moreover, from *review* of material in order to determine whether the material is exempt from disclosure (see paragraph (k) of this section). Searches may be done manually or by computer using existing programming.

(j) *Duplication* refers to the process of making a copy of a document necessary to respond to an FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

(k) *Review* refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (l) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(l) *Commercial Use Request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine the use to which a requester will put the documents requested. Moreover, where an agency has reasonable cause to doubt

## Architectural and Transp. Barriers Compliance Board

## § 1120.5

the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek additional clarification before assigning the request to a specific category.

(m) *Educational Institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(n) *Non-Commercial Scientific Institution* refers to an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (l) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(o) *Representative of the News Media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of *news*) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive.

Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of *freelance* journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publica-

tion record of a requester in making this determination.

[45 FR 80976, Dec. 8, 1980, as amended at 52 FR 43195, Nov. 10, 1987; 55 FR 2519, Jan. 25, 1990]

### § 1120.3 Existing records.

All existing A&TBCB records are subject to routine destruction according to standard record retention schedules.

## Subpart B—Published Information

### § 1120.5 Information published in the Federal Register.

(a) *General.* In accordance with the provisions of 5 U.S.C. 552(a)(1), basic information concerning the organization, operations, functions, substantive and procedural rules and regulations, officials, office locations, and allocation of responsibilities for functions and programs of the A&TBCB is published in the FEDERAL REGISTER for the guidance of the public. This information includes—

(1) Description of the A&TBCB's organization and the established places at which, the employees from whom, and the methods whereby the public may obtain information, make submissions or requests, or obtain decisions;

(2) Statements of the general course and method by which the A&TBCB's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the A&TBCB, and

(5) Each amendment, revision, or repeal of the foregoing. Indexes to the FEDERAL REGISTER are published in each daily issue and compiled currently on a monthly, quarterly, and annual basis. Copies of the FEDERAL REGISTER and its indexes are available in many libraries and may be purchased from the Superintendent of Documents, Government Printing Office,

## § 1120.6

Washington, DC 20402. No formal request to examine documents in the FEDERAL REGISTER is necessary to inspect them at the place where they are kept. Materials incorporated by reference in the FEDERAL REGISTER are available for inspection in A&TBCB offices.

(b) *Code of Federal Regulations.* Title 36 of the *Code of Federal Regulations*, which is republished and updated annually, contains a compilation of documents published by the A&TBCB in the FEDERAL REGISTER which set forth substantive and procedural rules and regulations of the A&TBCB and statements of general policy or interpretations of general applicability formulated and adopted by the Board. Copies of the Code of Federal Regulations are available in many libraries and may be purchased from the Superintendent of Documents. Reference copies maintained in offices of the A&TBCB are available for examination without formal request.

(c) *Effect of nonpublication.* Except to the extent that a person has actual and timely notice of its terms, no person may in any manner be required to resort to, or be adversely affected by, any procedure or matter required to be published in the FEDERAL REGISTER, but not so published. For the purposes of this paragraph, material that is reasonably available to the class of persons affected by it is considered to be published in the FEDERAL REGISTER if it has been incorporated by reference in the FEDERAL REGISTER with the approval of the Director of the Federal Register.

### § 1120.6 Information in A&TBCB publications.

(a) *General.* Copies of information material shall be available upon oral or written request so long as an adequate supply exists. These informational materials include press releases, pamphlets, and other materials ordinarily made available to the public without cost as part of a public information program, and reprints of individual parts of the Code of Federal Regulations or FEDERAL REGISTER relating to programs affecting substantial segments of the general public. Copies of informational publications of the

## 36 CFR Ch. XI (7–1–11 Edition)

A&TBCB which may be purchased from the Superintendent of Documents may be inspected in those offices of the A&TBCB in which reference copies are available. Compliance with the formal procedures provided in this part for obtaining access to A&TBCB records is not necessary for access to the materials described in this paragraph.

(b) *Published indexes.* The informational publications available from the A&TBCB may include indexes to materials published or contained in its records. They will include the current indexes required by the Freedom of Information Act to be maintained and made available for inspecting and copying, except as otherwise provided by published order, as noted below. These indexes provide identifying information for the public as to—

(1) Final opinions and orders made in the adjudication of cases;

(2) Statements of policy and interpretations adopted but not published in the FEDERAL REGISTER; and

(3) Administrative staff manuals and instructions to staff that affect a member of the public.

As promptly as possible after adoption of this part, these indexes will be made available to members of the public. Thereafter, updated indexes or supplements shall be published at least quarterly. However, the Board may determine by order published in the FEDERAL REGISTER that publication of an index is unnecessary and impracticable. In that case the Board shall provide copies of the index on request at a cost not to exceed the direct cost of duplication.

### Subpart C—Records Available for Public Inspection and Copying, Documents Published and Indexed

#### § 1120.11 Records available for inspection.

Except for those categories of materials listed in paragraph (a) of this section, paragraphs (a) (1) through (9) of § 1120.41 the following materials are available for public inspection and copying during normal business hours at the Washington office of the A&TBCB:

## Architectural and Transp. Barriers Compliance Board

## § 1120.22

(a) Final opinions and orders made in the adjudication of cases;

(b) Statements of policy and interpretations which have been adopted under the authority of the A&TBCB and are not published in the FEDERAL REGISTER;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) A record of the final votes of each member of the Board in every Board proceeding;

(e) Current indexes providing identifying information for the public as to the materials made available under paragraphs (a) through (d) of this section.

(f) All papers and documents made a part of the official record in administrative proceedings conducted by the A&TBCB in connection with the issuance, amendment, or revocation of rules and regulations or determinations having general applicability or legal effect with respect to members of the public or a class of the public.

(g) After a final order is issued in any adjudicative proceeding conducted by the A&TBCB, all papers and documents made a part of the official record of the proceeding. (The official docket is kept in the office of the administrative law judge hearing the case until a final order is issued.)

### § 1120.12 Indexes to certain records.

Current indexes are normally available to the public in published form as provided in § 1120.11. These indexes, whether or not published, are made available for inspection and copying on request. If published copies of a particular index are at any time not available or if publication of the index has been determined to be unnecessary and impracticable by order published in the FEDERAL REGISTER, copies of the index will be furnished on request. (See § 1120.6(b), *Published indexes*.)

### § 1120.13 Effect of nonavailability.

Any material listed in paragraph (a) of this section that is not indexed as required by § 1120.11(e) and § 1120.12, may not be cited, relied on, or used as precedent by the Board to adversely affect any member of the public unless the person against whom it is cited, re-

lied on, or used has had actual and timely notice of the material.

## Subpart D—Information Available Upon Request

### § 1120.21 Policy on disclosure of records.

(a) It is the policy of the A&TBCB to make information available to the public to the greatest extent possible in keeping with the spirit of the Freedom of Information Act. Therefore, all records of the A&TBCB, except those that the A&TBCB specifically determines must not be disclosed in the national interest, for the protection of private rights, or for the efficient conduct of public business to the extent permitted by the Freedom of Information Act, are declared to be available for public inspection and copying as provided in this part. Each member and employee of the A&TBCB is directed to cooperate to this end and to make records available to the public promptly and to the fullest extent consistent with this policy. A record may not be withheld from the public solely because its release might suggest administrative error or embarrass a member or employee of the A&TBCB.

(b) Subject to § 1120.51, any non-exempt A&TBCB record is available to the public upon request regardless of whether the requestor shows any justification or need for the record.

(c) An A&TBCB office may waive the procedures on this subpart in favor of the requestor, for reasons of the public interest, simplicity, or speed.

(d) If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed, after the exempt material has been deleted in accordance with § 1120.42.

### § 1120.22 Requests to which this subpart applies.

(a) This subpart applies to any written request (other than a request made by another Federal agency) received by the A&TBCB, whether or not the request cites the Freedom of Information Act, 5 U.S.C. 552, except with respect to records for which a less formal disclosure procedure is provided specifically in this part.

## § 1120.23

(b) Any written request to the A&TBCB for existing records prepared by the A&TBCB for routine public distribution, e.g., pamphlets, copies of speeches, press releases, and educational materials, shall be honored. No individual determination under § 1120.32 is necessary in these cases, since preparation of the materials for routine public distribution itself constitutes that a determination that the records are available to the public.

(c) This subpart applies only to records that exist at the time the request for information is made. (See § 1120.3, *Existing records*.)

### § 1120.23 Where requests for agency records must be filed.

A written request for records must be filed with the A&TBCB Freedom of Information Officer, Suite 501, 1111 18th Street NW., Washington, DC 20036. Requests may be mailed to that address or filed in person at that address during the A&TBCB's normal business hours.

[45 FR 80976, Dec. 8, 1980, as amended at 55 FR 2520, Jan. 25, 1990]

### § 1120.24 Misdirected written requests; oral requests.

(a) The A&TBCB cannot assure that a timely for satisfactory response under this subpart will be given to written requests that are addressed to A&TBCB offices, members, or employees other than the Freedom of Information Officer listed in § 1120.23. Any A&TBCB member or employee who receives a written request for inspection or disclosure of A&TBCB records must promptly forward a copy of the request to the Freedom of Information Officer, by the fastest practicable means, and must, if appropriate, commence action under § 1120.32.

(b) While A&TBCB members and employees will attempt in good faith to comply with oral requests for inspection or disclosure of A&TBCB records, by telephone or otherwise, these requests are not required to be processed in accordance with this subpart.

### § 1120.25 Form of requests.

A request must be in writing, must reasonably describe the records sought in a way that will permit their identi-

## 36 CFR Ch. XI (7-1-11 Edition)

fication and location, and must be addressed to the address set forth in § 1120.23, but otherwise need not be in any particular form. Each request under the Freedom of Information Act should be clearly and prominently identified by a legend on the first page, such as "Freedom of Information Act Request." The envelope in which the request is sent should be prominently marked with the letters "FOIA." It is helpful, but not necessary, for the requestor to include his or her phone number and the reason for the request. A request may state the maximum amount of fees which the requester is willing to pay. Under § 1120.33(d), the failure to state willingness to pay fees as high as are anticipated by the A&TBCB will delay running of the time limit and delay processing of the request, if the responsible official anticipates that the fees chargeable may exceed \$250.00.

[45 FR 80976, Dec. 8, 1980, as amended at 52 FR 43195, Nov. 10, 1987]

### § 1120.26 Deficient descriptions.

(a) If the description of the records sought in the request is not sufficient to allow the A&TBCB to identify and locate the requested records, the office taking action under § 1120.32 must notify the requestor (by telephone when practicable) that the request cannot be further processed until additional information is furnished.

(b) The A&TBCB must make every reasonable effort to assist the requestor in formulating his or her request. If a request is described in general terms (e.g., all records having to do with a certain area), the A&TBCB office taking action under § 1120.32 may communicate with the requestor (by telephone when practicable) with a view toward reducing the administrative burden of processing a broad request and minimizing the fee payable by the requestor. Such attempts must not be used as a means to discourage requests, but rather as a means to help identify with more specificity the records actually sought.

**§ 1120.31 A&TBCB receipt of requests; responsibilities of Freedom of Information Officer.**

(a) Upon receipt of a written request, the Freedom of Information Officer must mark the request with the date of receipt and must attach to the request a control slip indicating the Request Identification Number and other pertinent administrative information. The Freedom of Information Officer must immediately forward the request and control slip to the A&TBCB office which the FOIA Officer believes to be responsible for maintaining the records requested. The Freedom of Information Officer must retain a full copy of the request and control slip and must monitor the handling of the request to ensure a timely response.

(b) The Freedom of Information Officer must maintain a file concerning each request received. The file must contain a copy of the request, initial and appeal determinations, and other pertinent correspondence and records.

(c) The Freedom of Information Officer must collect and maintain the information necessary to compile the reports required by 5 U.S.C. 552(d).

**§ 1120.32 A&TBCB action on requests.**

(a) The FOIA Officer is delegated the authority to issue initial determinations concerning records which he or she believes are in the custody of a Board member, an employee of a member's agency, or an employee of a public member. When the FOIA Officer receives such a request, he or she shall forward it to the member, employee of a member agency, or employee of a public member whom the FOIA Officer believes to have custody of the records, requesting the records. The person to whom the request is forwarded shall, within three days of receipt of the FOIA Officer's request, either furnish the records requested to the FOIA Officer or inform the FOIA Officer of the time when they will be furnished. The FOIA Officer shall then determine whether or not to disclose the documents. For purposes of such requests and their processing under this subpart, the FOIA Officer is considered the office handling the requests.

(b) Heads of staff offices are delegated the authority to issue initial de-

terminations, other records which are in their respective custody.

(c) Whenever an A&TBCB office receives a request forwarded by the FOIA Officer, the office should:

(1) Take action under § 1120.26, if required, to obtain a better description of the records requested;

(2) Locate the records as promptly as possible, or determine that:

(i) The records are not known to exist; or

(ii) They are located at another A&TBCB office; or

(iii) They are located at another Federal agency and not possessed by the A&TBCB.

(3) When appropriate, take action under § 1120.53(b) to obtain payment or assurance of payment;

(4) Determine which of the requested records legally must be withheld, and why (see § 1120.42(b), *Release of exempt documents*);

(5) Of the requested records which are exempt from mandatory disclosure but which legally may be disclosed (see § 1120.42(a)), determine which records will be withheld, and why;

(6) Issue an initial determination within the allowed period (see § 1120.31), specifying (individually or by category) which records will be disclosed and which will be withheld, and signed by a person authorized to issue the determination under paragraph (a) of this section (see § 1120.33, *Initial denials of requests*);

(7) Furnish the Freedom of Information Officer a copy of the determination; and

(8) If the determination denies a request, furnish the Freedom of Information Officer the name of the A&TBCB member(s) or employee(s) having custody of the records and maintain the records in a manner permitting their prompt forwarding to the General Counsel upon request if an appeal from the initial denial is filed. (See also § 1120.34.)

(d) If it appears that some or all of the requested records are not in the possession of the A&TBCB office which has been assigned responsibility for responding to the request but may be in the possession of some A&TBCB office, the responding office must so inform

### § 1120.33

### 36 CFR Ch. XI (7–1–11 Edition)

the Freedom of Information officer immediately.

(e) An initial determination to disclose documents must provide the requested documents or provide the opportunity to inspect and/or obtain copies of the documents.

#### **§ 1120.33 Time allowed for initial action on requests.**

(a) Except as otherwise provided in this section, as soon as possible and not later than the tenth working day after the day on which the Freedom of Information Officer receives a request for records, the A&TBCB office responsible for responding to the request must issue a written determination to the requestor stating which of the requested records, will, and which will not, be released and the reason for any denial of a request.

(b) The period of 10 working days is measured from the date the request is first received and logged in by the Freedom of Information Officer.

(c) There is excluded from the period of 10 working days (or any extension) any time which elapses between the date that a requestor is notified by the A&TBCB under § 1120.26 that his or her request does not reasonably identify the records sought, and the date that the requestor furnishes a reasonable identification.

(d) There is excluded from the period of 10 working days (or any extension) any time which elapses between the date that a requestor is notified by an A&TBCB office under § 1120.53(b) that prepayment of fees is required, and the date that the requestor pays (or makes suitable arrangements to pay) the charges.

(e) The A&TBCB office taking action under § 1120.31 may extend the basic 10-day period established under paragraph (a) of this section by a period not to exceed 10 additional working days if—

(1) The office notifies the Freedom of Information Officer;

(2) The office notifies the requestor in writing within the basic 10-day period stating the reasons for the extension and the date by which the office expects to be able to issue a determination;

(3) The extension is reasonably necessary to properly process the particular request; and

(4) One or more of the following unusual circumstances require the extension:

(i) There is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) There is a need to search for, collect, and/or appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) There is need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the A&TBCB. The office must conduct the consultation with all practicable speed.

(f) Should the A&TBCB fail to issue a determination within the 10-day period or any authorized extension as to an initial request, or during the period for consideration of an appeal, the requestor shall be deemed to have exhausted his or her administrative remedies with respect to such.

In the latter situation, the requestor may commence an action in an appropriate Federal district court to obtain the records.

#### **§ 1120.34 Initial denials of requests.**

(a) An initial denial of a request may be issued only for the following reasons:

(1) The record is not under the A&TBCB's control;

(2) The record has been published in the FEDERAL REGISTER or is otherwise published and available for sale;

(3) A statutory provision, provision of this part, or court order requires that the information not be disclosed;

(4) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b) and the responding office has decided not to disclose it under §§ 1120.41 and 1120.42;

(5) The record is believed to be in the A&TBCB's custody but has not yet been located. (See paragraph (f) of this section.)

(b) Each initial denial of a request shall—



- (1) Be written, signed, and dated;
- (2) Contain a reference to the Request Identification Number;
- (3) Identify the records that are being withheld (individually or, if the denial covers a large number of similar records, by described category); and
- (4) State the basis for denial of each record of category of records or any reasonably segregable portion(s) thereof being withheld.

(c) If the issuance of the determination to deny a request was directed by some A&TBCB officer or employee other than the person signing the determination letter, that other person's identity and position must be stated in the determination letter.

(d) Each initial determination which denies, in whole or in part, a request for one or more existing, located A&TBCB records must state that the requestor may appeal the initial denial by sending a written appeal to the address shown in §1120.23 within 30 days of receipt of the determination. (See §1120.36.)

(e) A determination is deemed issued on the date the determination letter is placed in A&TBCB mailing channels for first class mailing to the requestor, delivered to the U.S. Postal Service for mailing, or personally delivered to the requestor, whichever date first occurs.

(f) When a request must be denied because the record has not yet been located (although it is believed to be in the A&TBCB's possession), the A&TBCB office responsible for maintaining the record must continue to search diligently until it is located or it appears that the record does not exist or is not in the A&TBCB's possession, and must periodically inform the requestor of the office's progress.

**§ 1120.36 Appeals from initial denials.**

(a) Any person whose request has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in §1120.23.

(b) Any appeal must be mailed or filed in person at the address shown in §1120.23—

- (1) In the case of a denial of an entire request, generally not later than 30 calendar days after the date the requestor

received the initial determination on the request; or

- (2) In the case of a partial denial, generally not later than 30 calendar days after the requestor receives all records being made available pursuant to the initial determination.

An appeal which does not meet the requirements of this paragraph may be treated either as a timely appeal or as a new request, at the option of the Freedom of Information Officer.

(c) The appeal letter must contain—

- (1) A reference to the Request Identification Number (RIN);
- (2) The date of the initial determination;

(3) The name and address of the person who issued the initial denial;

(4) A statement of which of the records to which access was denied are the subjects of the appeal; and

(5) If the applicant wishes, such facts and legal or other authorities as he or she considers appropriate.

**§ 1120.37 A&TBCB action on appeals.**

(a) The General Counsel must make one of the following legal determinations in connection with every appeal from the initial denial of a request for an existing, located record:

- (1) The record must be disclosed;
- (2) The record must not be disclosed because a statute or a provision of this part so requires; or
- (3) The record is exempt from mandatory disclosure but legally may be disclosed as a matter of agency discretion.

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is exempt from mandatory disclosure but legally may be disclosed, the matter must be referred to the Executive Director. If the Executive Director determines that an important purpose would be served by withholding the record, the General Counsel shall issue a determination denying the appeal. If the Executive Director determines that no important purpose would be served by withholding the record, the General Counsel must disclose the record.

(c) The General Counsel may delegate his or her authority under this section to any other attorney employed by the A&TBCB in connection

## § 1120.38

## 36 CFR Ch. XI (7–1–11 Edition)

with any category of appeals or any individual appeals.

(d) A determination denying an appeal from an initial denial must—

- (1) Be in writing;
- (2) State which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record;
- (3) State the reason(s) for denial of the appeal;
- (4) State the name and position of each A&TBCB officer or employee who directed that the appeal be denied; and
- (5) State that the person whose request was denied may obtain de novo judicial review of the denial by complaint filed with the district court of the United States in the district in which the complainant resides, or in which the agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

### § 1120.38 Time allowed for action on appeals.

(a) Except as otherwise provided in this section, as soon as possible and not later than the twentieth working day after the day on which the Freedom of Information Officer receives an appeal from an initial denial of a request for records, the General Counsel shall issue a written determination stating which of the requested records (as to which appeal was made) will and which will not be disclosed.

(b) The period of 20 working days shall be measured from the date an appeal is first received by the Freedom of Information Officer.

(c) The General Counsel may extend the basic 20-day period established under paragraph (a) of this section by a period not to exceed 10 additional working days if—

- (1) He or she notifies the Freedom of Information Officer;
- (2) He or she notifies the requestor in writing within the basic 20-day period stating the reasons for the extension and the date by which he or she expects to be able to issue a determination;
- (3) The extension is reasonably necessary to properly process the particular request; and
- (4) One or more of the following unusual circumstances require the extension:

(i) There is a need to search for and collect the records from field facilities or other establishments that are separated from the office processing the appeal;

(ii) There is a need to search for, collect, and/or appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) There is a need for consultation with another agency or among two or more components of the A&TBCB. The General Counsel must conduct the consultation with all practicable speed.

(d) No extension of the 20-day period may be issued under paragraph (c) of this section which would cause the total of all such extensions and of any extensions issued under § 1120.33(c) to exceed 10 working days.

### § 1120.41 Exempt documents.

(a) Generally, 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located, unpublished record in the A&TBCB's control may be denied by any A&TBCB office or employee unless the record contains (or its disclosure would reveal) matters that are—

(1) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to the Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to

## Architectural and Transp. Barriers Compliance Board

## § 1120.51

the extent that the production of such records would—

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures; or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The fact that the applicability of an exemption permits the withholding of a requested record (or portion of a record) does not necessarily mean that the record must or should be withheld. (See § 1120.42 *Release of exempt documents*.)

### § 1120.42 Release of exempt documents.

(a) An A&TBCB office may, in its discretion, release requested records despite the applicability of one or more of the exemptions listed in § 1120.41 (a)(2), (5), or (7). Disclosure of such records is encouraged if no important purpose would be served by withholding the records.

(b) Though the policy of the A&TBCB is to honor all requests, as indicated in § 1120.21(a), there are circumstances when the A&TBCB will not disclose a record if one or more of the FOIA exemptions applies to the record. The exemptions usually in such circumstances are exemptions (2), (3), (4), (6), (8) and (9). In these cases, where the A&TBCB has withheld a requested record, or portions thereof, the

A&TBCB will disclose the exempted record when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel.

## Subpart E—Copies of Records and Fees for Services

### § 1120.51 Charges for services, generally.

(a) It shall be the policy of the ATBCB to comply with requests for documents made under the FOIA using the most efficient and least costly methods available. Requesters will be charged fees, in accordance with the administrative provisions and fee schedule set forth below, for searching for, reviewing (in the case of commercial use requesters only), and duplicating requested records.

(b) *Categories of requesters.* For the purpose of standard FOIA fee assessment, the four categories of requesters are: Commercial use requesters; educational and non-commercial scientific institution requesters; requesters who are representatives of the news media; and, all other requesters (see § 1120.2 (1) through (o), Definitions).

(c) *Levels of fees.* Levels of fees prescribed for each category of requester are as follows:

(1) *Commercial Use Requesters*—When the ATBCB receives a request for documents which appears to be a request for commercial use, the Board may assess charges in accordance with the fee schedule set forth below, which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Costs for time spent reviewing records to determine whether they are exempt from mandatory disclosure applies to the initial review only. No fees will be assessed for reviewing records, at the administrative appeal level, of the exemptions already applied.

(2) *Educational and Non-Commercial Scientific Institution Requesters*—The ATBCB shall provide documents to requesters in this category for the cost of reproduction alone, in accordance with the fee schedule set forth below, excluding charges for the first 100 pages of reproduced documents.

## § 1120.52

## 36 CFR Ch. XI (7–1–11 Edition)

(i) To be eligible for inclusion in this category, requesters must demonstrate the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(ii) Requesters eligible for free search must reasonably describe the records sought.

(3) Requesters Who Are Representatives of the News Media—The ATBCB shall provide documents to requesters in this category for the cost of reproduction alone, in accordance with the fee schedule set forth below, excluding charges for the first 100 pages of reproduced documents.

(4) All Other Requestors—The ATBCB shall charge requestors who do not fit into any of the categories described above, fees which recover the full direct cost of searching for and reproducing records that are responsive to the request, except that the first two hours of search time and the first 100 pages of reproduction shall be furnished without charge.

(d) Schedule of FOIA fees.

(1) Record search (ATBCB employees)—\$14.00 per hour

(2) Document review (ATBCB employees)—\$20.00 per hour

(3) Duplication of documents (paper copy of paper original)—\$.20 per page

(e) No charge shall be made:

(1) If the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee;

(2) For any request made by an individual or group of individuals falling into the categories listed at paragraph (b) of this section, and described in paragraph (c) of this section, (excepting commercial use requests) the first two hours of search time and first 100 pages of duplication;

(3) For the cost of preparing or reviewing letters of response to a request or appeal;

(4) For responding to a request for one copy of the official personnel record of the requestor;

(5) For furnishing records requested by either House of Congress, or by duly

authorized committee or subcommittee or Congress, unless the records are requested for the benefit of an individual Member of Congress or for a constituent;

(6) For furnishing records requested by and for the official use of other Federal agencies; or

(7) For furnishing records needed by an A&TBCB contractor or grantee to perform the work required by the A&TBCB contract or grant.

(f) Requestors may be charged for unsuccessful or unproductive searches or for searches when records located are determined to be exempt from disclosure.

(g) Where the ATBCB reasonably believes that a requestor or group of requestors is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the ATBCB shall aggregate any such requests and charge accordingly.

[55 FR 2520, Jan. 25, 1990]

### § 1120.52 Computerized records.

(a) Information available in whole or in part in computerized form which is disclosable under the Freedom of Information Act is available to the public as follows:

(1) When there is an existing printout from the computer which permits copying the printout, the material will be made available at the per page rate stated in §1120.51(a) for each 8½ by 11 inch page.

(2) When there is not an existing printout of information disclosable under the Freedom of Information Act, a printout shall be made if the applicant pays the cost to the A&TBCB as stated in paragraph (a)(3) of this section.

(3) Obtaining information from computerized records frequently involves a minimum computer time cost of approximately \$100 per request. Multiple requests involving the same subject may cost less per request. Services of personnel in the nature of a search shall be charged for at rates prescribed in §1120.51(a). A charge shall be made for the computer time involved based upon the prevailing level of costs to Government organizations and upon the particular types of computer and associated equipment and the amounts

of time on such equipment that are utilized. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers based upon the prevailing levels of costs to Government organizations and upon the type and amount of the supplies and materials that are used.

(b) Information in the Board's computerized records which could be produced only by additional programming of the computer, thus producing information not previously in being, is not required to be furnished under the Freedom of Information Act. In view of the usually heavy workloads of the computers used by the Board, such a service cannot ordinarily be offered to the public.

**§ 1120.53 Payment of fees.**

(a) *Method of payment.* All fee payments shall be in the form of a check or money order payable to the order of the "U.S. Architectural and Transportation Barriers Compliance Board" and shall be sent (accompanied by a reference to the pertinent Request Identification Number(s)) to the address in § 1120.23.

(b) *Charging interest.* The ATBCB may charge interest to those requestors failing to pay fees assessed in accordance with the procedures described in § 1120.51. Interest charges, computed at the rate prescribed in section 3717 of title 31 U.S.C.A., will be assessed on the full amount billed starting on the 31st day following the day on which the bill was sent.

(c) *Advance payment or assurance of payment.* (1) When an ATBCB office determines or estimates that the allowable charges a requestor may be required to pay are likely to exceed \$250.00, the ATBCB may require the requestor to make an advance payment or arrangements to pay the entire fee before continuing to process the request. The ATBCB shall promptly inform the requestor (by telephone, if practicable) of the need to make an advance payment or arrangements to pay the fee. That office need not search for, review, duplicate, or disclose records in response to any request by that requestor until he or she pays, or makes

acceptable arrangements to pay, the total amount of fees due (or estimated to become due) under this subpart.

(2) Where a requestor has previously failed to pay a fee charged in a timely fashion, the ATBCB may require the requestor to pay the full amount owed, plus any applicable interest, as provided in paragraph (b) of this section, and to make an advance payment of the full amount of the estimated fee before any new or pending requests will be processed from that requestor.

(3) In those instances described in paragraphs (c)(1) and (2) of this section, the administrative time limits prescribed in § 1120.33(d) will begin only after the ATBCB has received all fee payments due or acceptable arrangements have been made to pay all fee payments due.

(d) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* Requestors are advised that the ATBCB shall use the authorities of the Debt Collection Act of 1982, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment of debts arising from freedom of information act requests.

(e) *Waiver or reduction of fees.* (1) Records responsive to a request under 5 U.S.C. 552 shall be furnished without charge or at a charge reduced below that established under paragraph (d) of § 1120.51 where the Freedom of Information Officer determines, based upon information provided by a requestor in support of a fee waiver request or otherwise made known to the Freedom of Information Officer, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—i.e., that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government—Freedom of Information Officer

shall consider the following four factors in sequence:

(i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contributing to increase public understanding of those operations and activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons. A requestor’s identity and qualifications—e.g., expertise in the subject area and ability and intention to effectively convey information to the general public—should be considered. It reasonably may be presumed that a representative of the news media (as defined in §1120.2(o)) who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requestors

who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requestors to identify a particular person who represents that he actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. Freedom of Information Officer shall not make separate value judgments as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is “important” enough to be made public.

(3) In order to determine whether the second fee waiver requirement is met—i.e., that disclosure of the requested information is not primarily in the commercial interest of the requestor—the Freedom of Information Officer shall consider the following two factors in sequence:

(i) The existence and magnitude of a commercial interest: Whether the requestor has a commercial interest that would be furthered by the requested disclosure. The Freedom of Information Officer shall consider all commercial interests of the requester (with reference to the definition of “commercial use” in §1120.2(1)) or any person on whose behalf the requestor may be acting, but shall consider only those interests which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration shall be given to the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requestors shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requestor is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requestor.” A fee waiver or reduction is warranted only where, once the “public interest” standard set out in paragraph (e)(2) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requestor’s commercial interest in disclosure. The Freedom of Information Officer shall ordinarily presume that where a news media requestor has satisfied the “public interest” standard, that will be the interest primarily served by disclosure to that requestor. Disclosure to data brokers or others who compile and market government information for direct economic return shall not be presumed to primarily serve “public interest.”

(4) Where only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraphs (e) (2) and (3) of this section, as they apply to each record request. One hundred pages of reproduction shall be furnished without charge.

(6) A request for reduction or waiver of fees shall be addressed to the Freedom of Information Officer at the address shown in § 1120.23. The ATBCB office which is responding to the request for records shall initially determine whether the fee shall be reduced or waived and shall so inform the requestor. The initial determination may be appealed by letter addressed to the address shown in § 1120.23. The General Counsel or his or her designee shall decide such appeals.

[45 FR 80976, Dec. 8, 1980, as amended at 52 FR 43196, Nov. 10, 1987; 55 FR 2521, Jan. 25, 1990]

## PART 1121—PRIVACY ACT IMPLEMENTATION

### Sec.

1121.1 Purpose and scope.

1121.2 Definitions.

1121.3 Procedures for requests pertaining to individuals’ records in a records system.

1121.4 Times, places, and requirements for the identification of the individual making a request.

1121.5 Access to requested information to the individual.

1121.6 Request for correction or amendment to the record.

1121.7 Agency review of request for correction or amendment of the record.

1121.8 Appeal of an initial adverse agency determination on correction or amendment of the record.

1121.9 Notification of dispute.

1121.10 Disclosure of record to a person other than the individual to whom the record pertains.

1121.11 Accounting of disclosures.

1121.12 Fees.

AUTHORITY: 5 U.S.C. 552a; Pub. L. 93–579.

SOURCE: 50 FR 3905, Jan. 29, 1985, unless otherwise noted.

### § 1121.1 Purpose and scope.

The purposes of these regulations are to:

(a) Establish a procedure by which an individual can determine if the Architectural and Transportation Barriers Compliance Board, hereafter known as the Board or ATBCB, maintains a system of records which includes a record pertaining to the individual; and

(b) Establish a procedure by which an individual can gain access to a record pertaining to him or her for the purpose of review, amendment and/or correction.

### § 1121.2 Definitions.

For the purpose of these regulations—

(a) The term *individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) The term *maintain* includes maintain, collect, use or disseminate.

(c) The term *record* means any item, collection or grouping of information about an individual that is maintained by the Board, including, but not limited to, his or her employment history, payroll information, and financial